



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Mr. Don Hultman, Refuge Manager
Upper Mississippi River National Wildlife and Fish Refuge
51 East Fourth St., Room 101
Winona, MN 55987

Re: Comments on Alternative E of the Comprehensive Conservation Plan for
the Upper Mississippi River National Wildlife and Fish Refuge

Dear Mr. Hultman:

I have been asked by various citizens of the state to examine Alternative E, the new Fish and Wildlife Service preferred alternative presented in the Comprehensive Conservation Plan (CCP) for the Upper Mississippi River National Wildlife and Fish Refuge, to ensure that it complies with the state's obligations to its citizens under the Wisconsin Constitution. This letter constitutes concerns of the Attorney General of the State of Wisconsin regarding Alternative E. I appreciate the opportunity to comment on these proposed changes and emphasize that I share with you many common goals in protecting citizens, fish, and wildlife in the national refuge system.

The State of Wisconsin is obligated to protect the state's navigable waters for its citizens under the public trust doctrine, which emanates from art. IX, § 1 of the Wisconsin Constitution. That article provides in relevant part that "the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free . . .".

The Upper Mississippi River National Wildlife and Fish Refuge was created by an act of Congress in 1924 that authorized the federal government to acquire land for the refuge, provided that the affected states of Minnesota, Wisconsin, Iowa, and Illinois gave their consent before land acquisition could take place. See 16 U.S.C. §§ 721 to 731. Wisconsin gave its consent in 1925, provided that several conditions are met. For example, Wis. Stat. § 1.035(2) & (3) state in part:

(2) The consent hereby given is upon the condition that . . . the navigable waters leading into the Mississippi and the carrying places between the same, and the navigable lakes, sloughs and ponds within or adjoining such areas, shall remain common highways for navigation and portaging, and the use thereof, as

well to the inhabitants of this state as to the citizens of the United States, shall not be denied.

(3) The legal title to and the custody and protection of the fish in the navigable waters leading into the Mississippi River and in the navigable lakes, sloughs and ponds within or adjoining such areas in this state, is vested in the state, for the purpose of regulating the enjoyment, use, disposition and conservation thereof.

I wish to impress upon you that the plan adopted by the Fish & Wildlife Service must assiduously abide by the reservation of all rights by the State of Wisconsin under Wis. Stat. § 1.035 and must not intrude into areas of regulation that were reserved for the State of Wisconsin at the time the Upper Mississippi National Fish and Wildlife Refuge was created. The proposed federal regulation of fish and fishing within the refuge must not conflict with this law, which demonstrates that the right to regulate these activities is vested in the State. I suggest that the U.S. Fish and Wildlife Service recognize that regulation of fishing, boating, hunting, and other state regulated activities within the Upper Mississippi National Refuge be done in the closest consultation possible with the State of Wisconsin.

Wis. Stat. § 1.035(2) is based on the constitutional provision found in Article IX, § 1 of the Wisconsin Constitution that is quoted above. Accordingly, any restrictions on navigation in the Refuge must comport with this provision. The Wisconsin Supreme Court has found that this constitutional provision, known as the Public Trust Doctrine, protects an array of public rights including, in addition to commercial navigation, a variety of purely recreational and nonpecuniary uses including boating, swimming, fishing, hunting, recreation, and scenic beauty. *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis. 2d 497, ¶19, 628 N.W.2d 781; *Gillen v. City of Neenah*, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998); *Hixon v. Public Service Comm.*, 32 Wis. 2d 608, 619, 146 N.W.2d 577 (1966); *Muench v. Public Service Comm.*, 261 Wis. 492, 507-08, 511-12, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

While an assortment of public rights in navigable waters are required to be protected, their exercise can conflict with each other. The State must balance the exercise of these public rights as part of its affirmative duty to deliver the most benefit for public use. Thus, no public right is absolute. Wisconsin Courts have held that all of the competing public rights under the Public Trust Doctrine must be balanced with each other:

The principle established by the [Wisconsin Supreme Court] cases is that no single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis. The principle has been reasserted in many decisions of the supreme court."

State v. Village of Lake Delton, 93 Wis. 2d 78, 96.

No single public use may be destroyed or greatly impaired. In *State v. Public Service Comm.*, 275 Wis. 112, 118, 81 N.W.2d 71 (1957), the court stated the kinds of factors that must be considered to determine whether the balance of public rights and interests has been sufficiently struck. They include whether public bodies will control the use of the area; whether the area will be devoted to public purposes and open to the public; whether the diminution of water area available to the public will be small when compared with the whole of the water body; whether no one of the public uses of the waterway will be destroyed or greatly impaired; and whether the disappointment of those members of the public who may desire to exercise particular public rights in the area is negligible when compared with the greater convenience to be afforded those members of the public who use the area.

Accordingly, any restrictions on navigation that may be imposed under Alternative E must be reasonable restrictions that are balanced with other public rights that are protected under the Public Trust Doctrine.

I understand that there are many competing public uses in the Upper Mississippi River National Wildlife and Fish Refuge. I know that you have conducted numerous open houses in communities near the Refuge in order to give the public the opportunity to ask questions and provide comments on the CCP as a whole and on the various alternatives. In response to comments from the public, you made changes to the previously preferred Alternative D in order to forge Alternative E. This process accords with the directive found at 16 U.S.C. § 668dd(a)(4)M that there shall be "effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the [National Wildlife Refuge] System are located."

In response to many comments from the public and from agencies in the affected states, you decreased both the number and the size of areas that are open only to boats powered by electric motors or paddles. You also changed closed areas from "no fishing" during waterfowl season to voluntary avoidance on all areas and no use of motors on small closed areas, and moved the start date of these restrictions from October 1 to October 15 to allow greater access. I am pleased that you have responded to the concerns of the public in these respects. As you work on finalizing the CCP, I urge you to continue to ensure that the public has reasonable access to navigation and to hunting and fishing in the Refuge.

I also share the concerns of many Wisconsin citizens that the CCP has an undue focus on controlling human uses of the Refuge, to the exclusion of dealing with resource conservation and protection issues such as non-point source pollution and sedimentation, invasive species, and habitat loss. While these issues are addressed in the CCP, they constitute a small part of the plan. As you work to finalize the CCP, I urge you to be certain to address in more detail these

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crucial issues. These issues should be carefully balanced along with any restrictions on human use of the Refuge, so that any such restrictions are reasonable and are not imposed to the exclusion of other key factors that affect the conservation of resources in the Refuge.

Thank you for your consideration of these comments.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Peggy A. Lautenschlager', with a long horizontal flourish extending to the right.

Peggy A. Lautenschlager
Attorney General

PAG:mrblkw

c: Representative Gabe Loeffelholz
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